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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2022

Arbitration hypnosis

USING HIDDEN GEMS TO RECALIBRATE YOUR DISTASTE FOR ARBITRATION

We've all been there: that sinking feeling when we realize a case either has an unbeatable arbitration agreement or has been compelled to arbitration. Your client's case is now worth a fraction of what it could have been in court. But what if some secret weapons could take the sting out of arbitration and perhaps provide leverage for your client? This article suggests ten strategic arbitration tips.

Tip #1: Fee waivers

Many clients compelled to arbitration – especially in the wage and hour class action context – are low-wage earners. Code of Civil Procedure section 1284.3, subdivision (b)(1) of the California Arbitration Act (CAA) acknowledges this reality and provides a useful remedy:

> All fees and costs charged to or assessed upon a consumer party by a private arbitration company in a consumer arbitration, exclusive of arbitrator fees, shall be waived for an indigent consumer. ("Indigence" is defined by statute as a gross monthly income less than 300% of the federal poverty level, adjusted for the number of household members. Los Angeles arbitration providers such as AAA and JAMS define "consumer" or "consumer party" as including employees or applicants for employment on their arbitration demand form.)

Your client makes a declaration under penalty of perjury that their monthly income falls below the threshold and states the number of persons living in the household. (Code Civ. Proc., § 1284.3, subd. (b)(3).) That's it. No further proof may be requested. (*Ibid.*)

Hooray, the respondent must now pay for all arbitration fees. But wait, there's more – hidden in the CAA (Code Civ. Proc., § 1282.5(b).) is this little gem:

> [I]n a consumer arbitration, a certified shorthand reporter shall be provided upon request of an indigent consumer, as defined in Section 1284.3, at the expense of the nonconsumer party.

Your client can request a reporter either (a) together with the demand, or (b) at a pre-hearing scheduling conference in which a deposition, proceeding, or hearing is being calendared. (Code Civ. Proc., § 1282.5, subd. (a)(2).) (A good time to raise this issue, if you have not included it in the pleading, is when meeting and conferring with opposing counsel in advance of the initial arbitration management conference, or at the conference itself if no meet and confer is required.) Do it early; delay runs the risk of an adverse ruling for failure to provide adequate notice. Also bear in mind that if the arbitrator has ordered a limited number of depositions, you may need to make this request with each subsequent deposition request.

Arguably, the request to have the respondent pay for the cost of the reporter also extends to the costs of the transcript. (See Code Civ. Proc., § 1282.5(a)(1) ["A party to an arbitration has the right to have a certified shorthand reporter transcribe any deposition, proceeding, or hearing..."].)

If the arbitrator refuses to allow your client a reporter under this section, you can immediately petition the court for an order compelling the arbitrator to grant your client's request. (Code Civ. Proc., § 1282.5, subd. (c).) The order can include a request to stay any deposition, hearing, or proceeding related to the arbitration until the court has ruled on the petition to compel. (*Ibid.*)

Take full advantage, particularly in employment cases where adequate discovery is required in arbitration. (*Armendariz v. Foundation Health Psychare Servs., Inc.*, (2000) 24 Cal.4th 83, 104 ["The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights."].)

Tip #2: You still might be able to get back to court

Being compelled to arbitration is no longer a presumptive victory for the defendant company. Even if the parties have proceeded to arbitration, a claimant may compel the action to court if the respondent does not timely pay its arbitration fees. Effective January 1, 2020, the Legislature enacted SB 707, known as the Forced Arbitration Protection Act of 2019, adding Sections 1281.96 through 1281.99 to the CAA. Section 1281.97, subdivision (a) provides:

> In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration administrator, the drafting party to pay certain fees and costs before the arbitration can proceed, if the fees or costs to initiate the

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arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration under Section 1281.2.

A similar provision exists waiving the right to continue with arbitration if, while the arbitration is pending, the drafting party fails to pay any fees within 30 days after the due date. (Code Civ. Proc., § 1281.98, subd. (a).)

If the company defaults at the outset, the claimant may unilaterally choose to do either of the following: (1) withdraw the action from arbitration and proceed in court (applicable statutes of limitations are tolled as of the date of the first filing of the claims in any forum), or (2) compel the defaulting company to pay for all reasonable fees and costs in the arbitration. (Code Civ. Proc., § 1281.97, subd. (b).)

If the breach occurs during the pendency of the arbitration, the claimant may: (1) withdraw from arbitration and proceed in court; (2) continue with the arbitration and the arbitration provider may commence a collection action against the defaulting company at the end of the proceeding; (3) petition the court for an order compelling the defaulting company to pay all arbitration fees it is obligated to pay; or (4) pay the company's fees, proceed with arbitration, and get an award ordering the company to pay all fees previously paid by the claimant, without regard to any findings on the merits of the underlying action. (Code Civ. Proc., § 1281.98(b).) The above choices rest solely with the non-drafting claimant, not with the arbitrator.

Another consequence of the claimant opting to proceed in court is that the court must impose sanctions on the company for materially breaching the arbitration agreement it drafted. (Code Civ. Proc., § 1281.97(d), § 1281.98, subd. (c)(2) & § 1281.99, subd. (a).) You also can bring a motion, or a separate action, to recover all attorney's fees and costs (not just reasonable fees and costs) associated with the abandoned arbitration, regardless of the merits of the underlying action. (Code Civ. Proc., § 1281.98, subd. (c)(1).)

Despite the potential power of SB 707, companies frequently evaded its reach simply by separately contacting the arbitration providers (without necessarily informing the claimant) to request extensions to the date the original payment was due. Without proper notice, and because arbitrators were reluctant to enforce SB 707, claimants did not always know when the payment deadline had been extended and therefore could not apply the full force of the statute.

All that changed effective January 1, 2022. On September 22, 2021, Governor Newsom signed into law SB 762, which closed the loophole to SB 707 by requiring arbitration providers to specify the final due date of the company's initiation fees as soon as the worker or consumer completes their filing requirements. SB 762 added a second subdivision to both 1281.97(a) and 1281.98(a), requiring arbitration providers both to "immediately provide" an invoice to all parties before the arbitration can proceed and to send an invoice of all costs and fees required for the arbitration to continue "to all parties by the same means on the same day." Further, SB 762 added Section 1657.1 to the Civil Code, which reads, "Any time specified in a contract of adhesion for the performance of an act required to be performed shall be reasonable." While this simply restates an existing general principle of contracting, codifying the requirement that companies may not unreasonably delay the timing of payment requirements helps prevent future abuses during – or at the outset of – arbitration.

Not every respondent will default on the fees, but when they do, you should be poised to use that to your client's advantage. Be vigilant about calendaring for this possibility.

Tip #3: Using the arbitrator's fee as leverage for mediation

Arbitration fees are not cheap. The time the arbitrator spends reviewing arbitration briefs, presiding over a multi-day hearing, and preparing an award can easily run into the high five figures or low six figures – and that is in addition to the fees and costs the defense attorneys will incur preparing for and attending the hearing. The respondent may wish to forgo the uncertainty of the hearing and pour those costs into settlement. Don't be surprised if you get a call within a few months of the arbitration fee deadline asking if your client would be interested in mediating the dispute. This is a leverage point you would not have in court.

Tip #4: Motions to disqualify following disclosures

You have researched arbitrators to ensure your client has a reasonable shot at fairness in the arbitration proceedings. But because employees and consumers do not have to pay for the arbitrator's fees and companies do, the danger of the "repeat player" effect is ever-present. What can you do to try to neutralize that potential disadvantage? Move to disqualify the arbitrator.

Code of Civil Procedure section 1281.9 requires the arbitrator to disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial," including whether the arbitrator has served as an arbitrator or mediator at any time in the previous two years, and any ongoing matters in which the arbitrator is participating. (Code Civ. Proc., § 1281.9, subd. (a)(1).); see *Honeycutt v. JPMorgan Chase Bank, N.A.* (2018) 25 Cal.App.5th 909, 930 [the arbitrator's failure to disclose four other matters for which she had served as a neutral for defense counsel until after the arbitral hearing had completed violated ethics standard 7(d) and deprived the employee of a reasonable opportunity to object, which gave cause to vacate the arbitrator's award in favor of the company].) If any party to the arbitration serves a notice of disqualification within 15 days of the disclosure, the arbitrator must be

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disqualified. (Code Civ. Proc., § 1281.9, subd. (b)(1).)

If you have even the slightest suspicion that your client may not be getting a fair shake in arbitration, monitor the arbitrator's disclosures carefully and move quickly to disqualify. Nothing prevents you from moving to disqualify more than one arbitrator, either. The motion process is disruptive and will not likely be well received, but it is a discretionary safeguard to give you a modicum of control over the process.

Tip #5: Informal discovery resolution

Informal discovery conferences, which are not uniformly applied in court, often are required by arbitration rules, and arbitrators value economy of time. On a practical level, this means your "motion" will simply be a letter brief, as opposed to a formal motion with a separate statement and declarations. More to the point, you probably will be able to get your arbitrator on the phone within a week or two instead of having to wait months before getting a hearing date. This helps to move your case forward with little delay – a win for you.

Tip #6: Educating your arbitrator about the case

Because discovery motions in arbitration are so expedited, you can effectively educate your arbitrator about the issues in your case with multiple motions. Missing key documents? Need to depose an essential witness? Explaining what you need and why you need it reinforces what is important in the case and allows you to frame the issues in your client's favor so that the arbitrator is primed to look for those issues at the arbitral hearing. Without a mandatory settlement conference or a jury, the arbitrator is your only target audience; tell your version of the case early and often, as needed.

Tip #7: Technical arguments can be persuasive

Arbitrators are either retired judges or longtime practitioners in your area of the law. Most arbitrators will understand and even welcome technical legal arguments regarding issues in the case. A favorable ruling could provide leverage for settlement if you are definitively able to establish liability – or if defense counsel sees the writing on the wall and seeks to avoid their client having to pay for a motion hearing they know they will lose.

Tip #8: No need to worry about class-certification issues

Where you have filed a class action in court and the court has ordered the arbitration of only your client's individual claims, a plus is that you do not have to establish that your client's experience was typical of other workers and, more importantly, you do not need to prove that common issues of fact and law predominate among an ascertainable class of individuals. This means you can concentrate on the totality of your client's experience without having to focus on how your client's experience relates to other putative class members. It also means a cost savings on experts and discovery.

Tip #9: Mass arbitrations

Some wage and hour plaintiff attorneys turn a class action waiver on its head by filing dozens, if not hundreds, of individual arbitrations arising out of the same wage and hour issues that would have been litigated in court on a class-wide basis. The company will have to fight the same fight on many fronts, incurring exponentially more fees than with a single claimant arbitration. Further, you could argue that having to pay multiple arbitrator fees would be unconscionable since in court you only would have had to pay the one class-action filing fee. The filing fees alone could encourage early settlement, and, as discussed above, if the defendant is late in paying the fees in any of the individual arbitrations, those cases could be compelled back to court pursuant to SB 707. Further, while there might not be a collateral estoppel effect between the individual hearings, retired judges accustomed to following precedent might find rulings in other hearings persuasive and more inclined to adopt the logic of those rulings. The prospect of losing dozens of times in a row could incentivize the company to settle.

Tip #10: Seek injunctive relief

Injunctive relief, even permanent injunctive relief, generally is available at any point in arbitrations as a form of equitable relief, which is within the arbitrator's powers. (See *O'Hare v. Mun. Res. Consultants* (2003) 109 Cal.App.4th 267, 277-278.) Being able to argue that your client has caused the company to change its practices not only for your client's sake but for the betterment of all employees should be a catalyst for attorney's fees. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565-568.)

Conclusion

Being compelled to arbitration can feel daunting or hugely disappointing, but it does not need to be. By utilizing the above strategies, you may be able to reclaim some of the leverage your client had while still in court or even return to court. At the very least, you will be a savvier litigator, and defense counsel will know they are in for a fight.

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